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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 32, and 52

**[FAC 2005-71; FAR Case 2012-031; Item I; Docket No. 2012-0031,
Sequence No. 1]**

RIN 9000-AM37

**Federal Acquisition Regulation; Accelerated Payments to Small
Business Subcontractors**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement the policy provided by Office of Management and Budget (OMB) Memoranda M-12-16, dated July 11, 2012, and M-13-15, dated July 11, 2013, by incorporating a new clause to provide accelerated payments to small business subcontractors.

DATES: Effective: **[INSERT DATE 30 DAYS AFTER PUBLICATION
IN THE FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-71, FAR Case 2012-031.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 77 FR 75089 on December 19, 2012, to implement OMB Memorandum M-12-16 that will provide for the acceleration of payments to small business subcontractors. OMB released Memorandum M-12-16, Providing Prompt Payment to Small Business Subcontractors, on July 11, 2012. This policy memorandum outlined the steps agencies shall take to ensure that prime contractors pay their small business subcontractors as promptly as possible. OMB released Memorandum M-13-15, Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors, on July 11, 2013. This policy memorandum extended the OMB Memorandum M-12-16's expiration date by one year to July 11, 2014.

Seven respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion

of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

As part of the implementation of OMB Memoranda M-12-16 and M-13-15, the FAR is amended to add a new FAR clause, Providing Accelerated Payments to Small Business Subcontractors. This new clause requires the prime contractor, upon receipt of accelerated payment from the Government, to make accelerated payments to small business subcontractors, to the maximum extent practicable, after receipt of a proper invoice and all proper documentation from small business subcontractors. This clause will be inserted into all new solicitations issued after the effective date of this rule and resultant contracts, including solicitations and contracts for the acquisition of commercial items. This rule does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

B. Analysis of public comments

1. Support for the rule.

Comment: Two respondents expressed support for the rule.

Response: The Councils note the public support for this rule.

2. Clause prescription.

Comment: One respondent recommended adding a paragraph to FAR 52.212-4 to incorporate the new clause in lieu of prescribing the clause in FAR 12.301(d)(4).

Response: The unique nature of the temporary guidance issued in the OMB Memorandum M-12-16, Providing Prompt Payment to Small Business Subcontractors, (and as extended by OMB Memorandum M-13-15) required a new independent clause 52.232-40; thus, a distinct prescription in FAR 12.301(d)(4) is intentionally created.

3. Privity of contract.

Comment: One respondent recommended that the Government should refrain from creating a privity of contract between the Government and the subcontractors. Respondent asserts that this may lead to a cause of action for the subcontractor against the Government if the prime contractor defaults on these requirements.

Response: Directing the prime contractor, upon receipt of accelerated payment from the Government, to accelerate payments to subcontractors does not create privity of contract between the Government and the subcontractors.

4. Compliance with the rule.

Comment: One respondent expressed concern that the rule did not identify a responsible Government party for

addressing the prime's failure to accelerate payments to subcontractors. The respondent also stated that the rule does not provide penalties for the prime's failure to accelerate payments. Another respondent stated that the proposed rule lacks clarity as to how the Government will audit contractors to ensure compliance, and to what performance standards prime contractors will be held.

Response: The rule does not create any new remedies for subcontractor payment issues. Subcontractors would utilize existing remedies for non-payment similar, but not limited, to FAR 32.112. If, upon receipt of accelerated payment from the Government, the prime fails to accelerate payments to the maximum extent practicable, the Government may discontinue accelerated payments to the prime contractor. The Government may review prime contractor payments and procedures to ensure the required accelerated payments to small business subcontractors are made to the maximum extent practicable. This flexibility is intended to accommodate varying prime contractor capabilities to make accelerated payments.

5. Definition.

Comment: A number of respondents stated that the rule is not specific as to what constitutes "accelerated payments to the maximum extent practicable". Two respondents took issue with the lack of specificity, while

another supported the flexibility offered by the language. Two respondents questioned what is the definition of accelerated payments. One respondent recommended adding to the definition of accelerated payments that the prime contractor would not be required to accelerate payments equal to or less than the accelerated payment cycle received from the Government.

Response: The flexibility in the clause language is intended to accommodate varying contractor capabilities to make accelerated payments.

6. Pre-existing regulatory coverage.

Comment: One respondent stated that the additional language in this FAR rule is unnecessary. The respondent finds FAR 52.232-1 sufficient to accelerate payments to small business subcontractors.

Response: FAR 52.232-1 does not address accelerated payments to prime contractors or subcontractors; it addresses general conditions for payments to prime contractors on certain fixed-price contracts.

7. Administrative burden.

Comment: One respondent stated the rule will result in increased administrative costs, and an evaluation of the existing payment environment should have preceded this rule making. Another respondent recommended adding the following language to the rule, "The proposed rule is not intended to

impose any additional reporting, recordkeeping, or other information collection requirements."

Response: The respondent did not specify what administrative costs would be increased. However, this rule is established to ensure that, upon receipt of accelerated payment from the Government, the prime contractors shall accelerate payments to small business subcontractors to the maximum extent practicable. The Government gave consideration to relevant payment environment factors prior to issuance of this rule. The addition of the recommended language is unnecessary because this rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act.

8. Commercial practices.

Comment: One respondent opined that Government prime contractors have subcontractor payment terms and payment timelines that are much more subcontractor friendly than those found in the commercial marketplace.

Response: The Councils appreciate those prime contractors who pay their subcontractors on a timely basis, and is issuing this rule to require prime contractors, upon receipt of accelerated payment from the Government, to pay their small business subcontractors in an accelerated manner to the maximum extent practicable.

9. Rule applicability.

Comment: One respondent stated that the rule forces prime contractors to accelerate payments to subcontractors on non-government programs and therefore equitable price adjustments should be expected.

Response: The rule applies to those prime contractors for which the Government provides accelerated payment. It requires prime contractors, upon receipt of accelerated payment from the Government, to accelerate payments to their small business subcontractors under Government prime contracts that include the clause; it does not require prime contractors to accelerate payments to other than their small business subcontractors on Government prime contracts.

Comment: Another respondent recommended applying this requirement to current contracts as well as existing solicitations and limiting the application of this rule to first tier subcontractors.

Response: In accordance with FAR 1.108(d), contracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.

The rule is not limited to first-tier subcontractors, because that is inconsistent with the OMB memo that this rule implements, and would reduce the number of small entities that may benefit from this rule.

10. Regulatory rule-making process.

Comment: One respondent encouraged the Government to delay the rule and hold a series of public meetings to gain a better understanding of the challenges the rule would create.

Response: The public was provided an opportunity to comment through the standard rule-making process of publication of the proposed rule in the Federal Register. All comments received were considered in the formation of this final rule.

11. Implementation.

Comment: One respondent noted the current budgetary crisis and recommended a delay in the implementation of this rule. Another respondent recommended the rule emphasize that prime contractors be required to make accelerated payments only if the Government accelerates payments to the prime contractor.

Response: If the Government does not accelerate payment to a prime contractor, that prime contractor is under no obligation to accelerate payments to its small business subcontractors. While the clause requires the

prime contractor to accelerate payments to its small business subcontractors under certain conditions, it does not prevent the prime contractor from paying any of its subcontractors on an accelerated basis, if it elects to do so, without regard to the receipt of accelerated payments from the Government.

12. Accelerated payments.

Comment: One respondent recommended guidance that states that Government payments will not be considered accelerated if they are made beyond the Prompt Payment Act thresholds for the incurrence of interest.

Response: Payments under which prompt payment interest has been applied are not Government accelerated payments.

III. Additional Rulemaking

The Councils are considering the need for further FAR guidance relative to facilitating accelerated payments to small business subcontractors. This additional guidance could take the form of additional FAR revisions, or new FAR provisions and clauses, if appropriate. The Councils may decide to publish a Request for Information in the near future to consider its options to address accelerated payments to small business subcontractors. This will support the OMB Memorandum M-13-15, Extension of Policy to Provide Accelerated Payment to Small Business

Subcontractors, requirement for the Councils to solicit public input on strategies that might be used over the longer term to help maintain effective cash flow and prompt payment to small business subcontractors.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

Although it may have a positive impact on small business subcontractors, DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities

within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this rule implements the temporary policy provided by OMB Policy Memoranda M-12-16, Providing Prompt Payment to Small Business Subcontractors, dated July 11, 2012 and M-13-15, Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors, on July 11, 2013, which are designed to accelerate payment from Federal contractors to their small business subcontractors. The rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

This final rule adds a FAR clause that will provide for accelerated payments from the prime contractor to its small business subcontractors when the prime contractor receives an accelerated payment from the Government thus implementing this OMB policy. This rule requires prime contractors, upon receipt of accelerated payments from the Government, to make accelerated payments to their small business subcontractors, improving small business cash flow overall.

No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule and no changes were made to the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 12, 32, and 52

Government procurement.

Dated: November 18, 2013.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 32, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 32, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 12.301 by adding paragraph (d)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(4) Insert the clause at 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, as prescribed in 32.009-2.

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PART 32—CONTRACT FINANCING

32.002 [Amended]

3. Amend section 32.002 by removing from paragraph (a)(1) "32.005" and adding "32.009" in its place.

4. Add section 32.009 to read as follows:

32.009 Providing accelerated payments to small business subcontractors.

32.009-1 General.

Pursuant to the policy provided by OMB Memorandum M-12-16, Providing Prompt Payment to Small Business Subcontractors (and as extended by OMB Memorandum M-13-15, Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors), agencies shall take measures to ensure that prime contractors pay small business subcontractors on an accelerated timetable to the maximum extent practicable, and upon receipt of accelerated payments from the Government. This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

32.009-2 Contract clause.

Insert clause 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, in all solicitations and contracts.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.213-4 by—
 - a. Revising the date of the clause;
 - b. Redesignating paragraphs (a)(2)(vi) through (a)(2)(viii) as paragraphs (a)(2)(vii) through (a)(2)(ix), respectively;
 - c. Adding a new paragraph (a)(2)(vi).

The revision and addition read as follows:

52.213-4 Terms and Conditions-Simplified Acquisitions

(Other Than Commercial Items).

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TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL
ITEMS) ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF
PUBLICATION IN THE FEDERAL REGISTER])

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(a) * * *

(2) * * *

(vi) 52.232-40, Providing Accelerated Payments to
Small Business Subcontractors ([INSERT ABBREVIATED MONTH AND
YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

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6. Add section 52.232-40 to read as follows:

**52.232-40 Providing Accelerated Payments to Small Business
Subcontractors.**

As prescribed in 32.009-2, insert the following clause:

PROVIDING ACCELERATED PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS
([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION
IN THE FEDERAL REGISTER])

(a) Upon receipt of accelerated payments from the
Government, the Contractor shall make accelerated payments
to its small business subcontractors under this contract, to
the maximum extent practicable and prior to when such
payment is otherwise required under the applicable contract
or subcontract, after receipt of a proper invoice and all
other required documentation from the small business
subcontractor.

(b) The acceleration of payments under this clause
does not provide any new rights under the Prompt Payment
Act.

(c) Include the substance of this clause, including
this paragraph (c), in all subcontracts with small business

concerns, including subcontracts with small business concerns for the acquisition of commercial items.

(End of clause)

7. Amend section 52.244-6 by—

- a. Revising the date of the clause;
- b. Redesignating paragraph (c)(1)(x) as paragraph (c)(1)(xi); and
- c. Adding a new paragraph (c)(1)(x).

The revision and addition read as follows:

52.244-6 Subcontracts for Commercial Items.

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SUBCONTRACTS FOR COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR
30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(c)(1) * * *

(x) 52.232-40, Providing Accelerated Payments to Small Business Subcontractors ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]), if flow down is required in accordance with paragraph (c) of FAR clause 52.232-40.

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[BILLING CODE 6820-EP]

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11/25/2013]